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NTSB Order No. EA-3842

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11179
v.)	
)	
DANIEL E. FLOWERS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued on December 18, 1990, by Administrative Law Judge William A. Pope, II, following an evidentiary hearing held on December 17, 1990.¹ In that decision, the law judge found that respondent violated section 121.548 of the Federal Aviation Regulations

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

(FAR)² when he failed to provide free and uninterrupted access to the cockpit to an FAA aviation safety inspector who had presented his credentials in connection with a scheduled en route inspection. The law judge reduced the period of suspension from 30 days, as sought in the Administrator's order of suspension, to 15 days.

The facts of this case are as follows. On February 8, 1989, respondent was serving as pilot in command of a Boeing 737 being operated as USAir Flight 485 from La Guardia Airport to Rochester, New York. FAA Aviation Safety Inspector Nelson Soto had made arrangements with USAir several days earlier to conduct an en route inspection on that flight. (Tr. 72.) Upon his arrival at La Guardia, after checking in with a USAir ticket agent who verified that his presence on the flight was reflected in the computer system, Inspector Soto was escorted to the aircraft by a flight attendant. (Tr. 73-4.) He presented his credential³ to the First Officer (respondent was not in the

² Section 121.548 provides:

**§ 121.548 Aviation safety inspector's credentials;
Admission to pilot's compartment.**

Whenever, in performing the duties of conducting an inspection, an inspector of the Federal Aviation Administration presents form FAA 110A, "Aviation Safety Inspector's Credential," to the Pilot in command of an aircraft operated by an air carrier or commercial operator, the inspector must be given free and uninterrupted access to the pilot's compartment of that aircraft.

³ The inspector's credential -- Form 110A (essentially an official identification card, See Exhibit A-3) -- states, in part, that the aviation safety inspector whose signature and photograph appear thereon is authorized to issue FAA Form 8430-13

cockpit at the time) and began his inspection. (Tr. 74, 76.)

When respondent boarded the airplane shortly thereafter, Inspector Soto introduced himself, again presented his credential, and told respondent he would be conducting an en route inspection. (Tr. 79, 81, 132.) When respondent asked whether the inspector had the appropriate paperwork, the inspector (thinking respondent meant FAA Form 8430-13, regarding access to the aircraft) said he had given it to the First Officer. (Tr. 81, 132-3.) Respondent, who admitted that he may have been offended by the inspector's announcement that he would be riding with them, proceeded to enter the cockpit without Inspector Soto and allowed the door to close behind him. (Tr. 82, 297, 328-9.) Although Inspector Soto was under the impression that respondent had locked the door, it appears from the record that the door was probably not locked. (Tr. 82, 137, 243, 245.)

Ten to fifteen seconds later respondent emerged from the cockpit and told Inspector Soto that he did not have the appropriate paperwork. (Tr. 82, 133-4.) When Inspector Soto protested that he had already presented the required paperwork, respondent indicated that the inspector had better get the right paperwork or he would not be flying with him, and then gestured with his hands that Inspector Soto should leave the aircraft.

(..continued)

for access to U.S. registered aircraft and must be given free and uninterrupted entry to the pilot's compartment in the performance of official duties.

Along with his Form 110A, Inspector Soto presented a Form 8430-13. (Tr. 74.)

(Tr. 82-3, 133-4, 143.) Inspector Soto left the aircraft and returned to the ticket area where a flight attendant informed him that the paperwork had already been filled out by USAir Operations and he was free to reenter the aircraft. (Tr. 83, 147.) Just as the inspector began heading back to the aircraft, respondent appeared in the ticket area and, for the next approximately 50 minutes, he and Inspector Soto attempted to resolve an issue related to the aircraft's registration certificate. After the issue was resolved, respondent and Inspector Soto reentered the aircraft and the en route inspection proceeded without incident.⁴

In demanding the "right paperwork," respondent was apparently referring to a USAir jumpseat pass, an internal document issued by the airline to jumpseat riders and used to compute weight and balance information for the flight.⁵ It is

⁴ There was extensive and conflicting testimony at the hearing as to what was said regarding the validity of the aircraft's registration -- respondent claims the inspector told him it was expired, whereas Inspector Soto maintains he only said a hard copy should be obtained to replace the temporary certificate -- and who was responsible for the resulting delay caused by obtaining verification of the registration's validity. There was also a great deal of testimony about whether (once both had returned to the cockpit) respondent was entitled to require the inspector to use the company's headset rather than the inspector's FAA-issued headset. Other than the fact that these episodes illustrate the generally confrontational tone of respondent's dealings with the inspector, we agree with the law judge that they are not relevant to our consideration of whether respondent violated FAR 121.548.

⁵ The USAir Flight Operations Manual in effect at the time provided that "[t]he appropriate [USAir] Operations office shall issue and each jumpseat rider shall obtain Form OF-48 which shows that an individual has obtained permission to occupy the jumpseat." (Exhibit R-3.) The passes are normally delivered to

undisputed that, although USAir often issues such passes to FAA inspectors, FAA inspectors do not require a jumpseat pass and need only present their credential (Form 110A) in order to obtain access to the cockpit. (Tr. 189-91.)⁶ The First Officer testified that he told respondent when he first came on board that he (the First Officer) had called USAir Operations and informed them of the jumpseat rider for weight and balance purposes. (Tr. 242, 244, 250.) Although respondent denies the First Officer told him this, the law judge made an explicit credibility finding in favor of the First Officer's testimony on this point, concluding that respondent therefore knew that there was no additional need for the jumpseat pass. (Tr. 461.)

Inspector Soto testified that respondent spoke to him at all times in a loud and "upsetting" tone. (Tr. 82, 83, 133.) He also stated that the USAir gate agent and several flight attendants apologized for the captain's conduct towards him. (Tr. 86, 100.) The senior Flight Attendant on board the flight testified that respondent's whole manner toward Inspector Soto was rude.

Although respondent's testimony differed from Inspector Soto's in many respects he admits that, even after Inspector Soto showed his credential several times, he nonetheless insisted that

(..continued)
the captain by a flight attendant, not by the jumpseat rider.
(Tr. 140, 180, 249, 359-60.)

⁶ Inspector Soto noted that he has performed over 800 en route inspections in his career and has never before been asked to present a jumpseat pass to a captain. (Tr. 69-70, 98-99.)

the inspector obtain a USAir jumpseat pass. Respondent testified that, in response to Inspector Soto's question, "are you telling me to do this," he said "yes . . . just go on up there and get one." (Tr. 302, 352.) The law judge found that Inspector Soto's account of the events was more credible,⁷ but noted that even respondent's account supported a finding that he denied the inspector access to the cockpit. (Tr. 456-7.)

On appeal, respondent argues that the law judge's finding of violation is not supported by a preponderance of the evidence in this case, or by Board precedent. He also contends that, even if the violation is upheld, no sanction should be imposed. The Administrator argues in reply that the law judge's finding of violation is supported by a preponderance of the evidence and his imposition of a 15-day suspension is consistent with prior case law. For the reasons discussed below, we deny respondent's appeal and affirm the initial decision of the law judge.

It is undisputed that Inspector Soto, in performing the duties of conducting an inspection, presented his Form 110A ("Aviation Safety Inspector's Credential") to respondent, who was serving as pilot in command of an aircraft operated by an air carrier. Upon review of the entire record in this case, we are convinced that the preponderance of the evidence clearly shows that respondent thereafter failed to give the inspector free and

⁷ We see no reason to disturb any of the law judge's credibility findings in this case, as they are within his exclusive province. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

uninterrupted access to the pilot's compartment, as required by 14 C.F.R. 121.548. Specifically, respondent denied access when he told Inspector Soto that he would have to obtain a USAir jumpseat pass or he would not be permitted to fly with him, and then motioned the inspector out of the plane.⁸ Even assuming respondent justifiably believed that Inspector Soto was required to have a jumpseat pass (which the law judge found, and we agree, respondent did not), such a belief does not excuse respondent's failure to give the inspector access to the cockpit while respondent attempted to resolve the issue.

Respondent asserts that there can be no finding of a violation of section 121.548 unless the Administrator proves that the inspector was unable to perform the planned inspection. (App. Br. at 14.) Although many of our prior cases do involve situations where the denial of access resulted in no inspection being performed,⁹ this is not an element of the violation. The regulation clearly states that, upon presentation of his credential, an inspector must be given free and uninterrupted access to the pilot's compartment. When respondent denied that access, the violation was complete and Inspector Soto might have

⁸ We disagree with the law judge that respondent also denied access when he first entered the cockpit, allowing the door to close behind him. Even though the inspector believed respondent had locked him out of the cockpit, the preponderance of the evidence indicates that the door was not in fact locked, and, accordingly, the inspector was not precluded from entering.

⁹ See e.g., Administrator v. Kellogg, 1 NTSB 1254 (1971), Administrator v. Glowka, 3 NTSB 2353 (1980), Administrator v. Thorn, NTSB Order No. EA-2973 (1989).

decided to depart the scene entirely. The fact that Inspector Soto persevered and ultimately conducted his en route inspection does not make respondent's initial denial of access any less of a violation.

We disagree with respondent that Administrator v. Kellogg, 1 NTSB 1254 (1971) is controlling in this case. In that case we found no violation in the pilot's refusal to allow the inspector to use the center observer seat in the cockpit (from which inspections were to be conducted according to an internal FAA policy), because the pilot acted in good faith and in accordance with a reasonable interpretation of the company's operations manual (which in effect required that the second officer occupy the center seat).

To the extent that there is any conflict in this case, it is between the company manual (which states that jumpseat riders "shall obtain Form OF-48 which shows that an individual has obtained permission to occupy the jumpseat") and section 121.548 (stating that inspectors need only present Form 110A in order to obtain free and uninterrupted access to the cockpit). Whereas in Kellogg we noted that there was nothing in the record to indicate that the respondent was aware of the internal FAA policy regarding use of the center seat, respondent in this case must be held to a knowledge of the FAR (Administrator v. Hinkle, 3 NTSB 1044, 1045-6) which preempts any arguably contrary requirements contained in a company manual. Administrator v. Chiplock, NTSB Order No. EA-3556 at 5 (1992) (company manual is superseded by

FAR when the two are inconsistent).

Furthermore, respondent's claim that, like the pilot in Kellogg, he was motivated by safety concerns (in that the jumpseat form is used for weight and balance calculations) is belied by the First Officer's testimony that he told respondent he had already informed the operations office about the inspector's presence for purposes of weight and balance calculations. We agree with the law judge that the circumstances of this incident as a whole indicate that respondent was "acting out of pique," and not out of concern for compliance with company procedures. (Tr. 462.) Accordingly, for all of these reasons, our reasoning in Kellogg is inapposite to this case.

Finally, respondent argues that no sanction should be imposed because he filed a report pursuant to the Aviation Safety Reporting Program (ASRP) or, in the alternative, because mitigating factors exist in this case. We have previously held that denial of access to the cockpit is not the type of aircraft operation to which the ASRP was intended to apply. Administrator v. Crim, 3 NTSB 2471, 2472 (1980), see also Administrator v. Schuttler, NTSB Order No. EA-3487 (1992) at 8-9. However, we would reject respondent's claim even if the ASRP was applicable to this case because one of the limitations of the sanction waiver provision of the ASRP is that the violation must be inadvertent and not deliberate. Administrator v. Smith, 5 NTSB 1560, 1564 (1986). In view of the law judge's finding (with which we agree) that respondent did not justifiably believe a

jumpseat pass was necessary, respondent's violation in this case was deliberate, and therefore he cannot claim immunity from sanction under the ASRP. Although not critical to our decision on this point, we note also that respondent's claim to ASRP immunity for this violation is suspect in light of his testimony suggesting that the ASRP report did not pertain to his denial of access to the inspector but, rather, pertained to the dispute surrounding the aircraft registration. (Tr. 371-2.)

The law judge's imposition of a 15-day suspension of respondent's pilot certificate is consistent with our precedent.¹⁰ We do not agree that mitigating factors exist in this case to justify any further reduction in the sanction.

¹⁰ See e.g., Administrator v. Farrell, 2 NTSB 1480 (1975) (15 days); Administrator v. Glowka, 3 NTSB 2353 (1980) (15 days); Administrator v. Brown, 5 NTSB 553 (1985) (20 days); Administrator v. Thorn, NTSB Order No. EA-2973 (1989) (15 days).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 15-day suspension of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹¹ For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).